

AGENDA DOCUMENT #96-73

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FEDERAL ELECTION COMMISSION

Washington, DC 20463

June 20, 1996

AGENDA ITEM
For Meeting of: JUN 27 1996

MEMORANDUM

TO: The Commission

THROUGH: John C. Surina
Staff Director

FROM: Lawrence M. Noble
General Counsel

N. Bradley Litchfield
Associate General Counsel

Michael G. Marinelli
Staff Attorney *mm*

SUBJECT: Draft AO 1996-25

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for June 27, 1996.

Attachment

DRAFT

1
2 **ADVISORY OPINION 1996-25**

3
4 **David Frulla**
5 **Brand, Lowell & Ryan P.C.**
6 **923 Fifteenth Street, N.W.**
7 **Washington, D.C. 20005**

8
9 **Dear Mr. Frulla:**

10
11 **This refers to your letters dated May 24 and May 10, 1996, which request advice**
12 **concerning application of the Federal Election Campaign Act of 1971, as amended ("the Act"),**
13 **and Commission regulations to the voluntary check-off program maintained by Seafarers**
14 **Political Activity Donation ("SPAD"). You ask about the application of the Commission's**
15 **recently amended "best efforts" regulation to SPAD's check-off program and SPAD's obligation**
16 **to identify the employers of SPAD's union member contributors.**

17 **SPAD is the separate segregated fund of the Seafarers International Union ("SIU") which**
18 **represents merchant seamen and boatmen ("seamen") aboard U.S.-flag vessels on the high seas,**
19 **the Gulf of Mexico, and inland lakes and waterways. Almost all of these seamen are employed**
20 **through what is known as "rotary" crewing. This consists of SIU regional hiring halls referring**
21 **union members for periodic employment with SIU-contracted companies.¹ Once referred, an**
22 **individual merchant seaman will generally work for a shipping company employer only for the**
23 **duration of a trip at sea. A trip lasts only a few months and, often times, they are even shorter.**
24 **You state that, after the trip concludes, the SIU member returns to the "beach" and places his or**
25 **her name on the hiring hall's list of individuals waiting to ship. The union member then returns**

¹ You state that there are approximately one hundred companies that have contracted with SIU to obtain the referral of SIU members for employment.

1 to work some time later, most often for a different employer, once he or she has reached the top
2 of the hiring list.

3 You point out that the periodic and ever-changing nature of maritime employment
4 precludes SPAD from using a conventional, labor organization separate segregated fund check-
5 off program. To deal with the circumstances of the rotary crewing, SPAD's check-off
6 contributions are remitted from a participating member's share of the SIU's employer-funded
7 vacation plan, and not from individual SIU-contracted employers.² SPAD solicits a member to
8 voluntarily check off a portion (usually fifty cents) of each day of employment for which he or
9 she applies for vacation pay. You explain that this approach surmounts the logistical barriers
10 preventing SPAD from maintaining a check-off arrangement with individual SIU- contracted
11 employers.

12 You state that SPAD's solicitations ask each participating SIU member to provide his or
13 her name or address. You add that contributors willingly provide this information and SIU's
14 vacation plan has this information on file. SPAD also obviously knows the occupations of its
15 contributors who participate in the SIU's vacation plan check-off. They are all merchant
16 mariners. The above information is therefore easily disclosed in SPAD's reports filed with the
17 Commission. However, due to the nature of the rotary crewing system described above, you
18 state that SPAD does not ask a participating SIU member to identify his or her employer on its

² You state that pursuant to its collective bargaining agreement with SIU, an employer must make a payment to the SIU vacation plan on behalf of each SIU member that it has employed. An employers' vacation plan payment for an individual union member corresponds to the length of his or her employment with that company. Provided other eligibility criteria are met, an SIU member may request vacation pay at the conclusion of his or her trip at sea, whereupon the SIU vacation plan will issue the member one lump sum check comprising all the vacation pay to which the member is entitled. The administration of the plan is kept technically separate from SIU. However, it is administered by a board of trustees comprised in equal part of management and union representatives.

1 check-off authorization form. SPAD does not independently seek this information from a
2 member whose annual contributions exceeds \$200. You note that at the time a contribution is
3 obtained through the check-off program, the contributor is between assignments and is not
4 working for any employer. Because of the above circumstances, you ask that the Commission
5 conclude that SPAD's seeking the contributor's name, address and occupation but not seeking
6 the contributor's employer meets its "best efforts" requirement as set forth in Commission
7 regulations. In the event that SPAD must complete the employer box of its FECA disclosure
8 forms, you propose that SPAD be permitted to report that the contributor is employed by
9 "various U.S.-flag vessel operators."³

10 When the treasurer of a political committee shows that best efforts have been used to
11 obtain, maintain, and submit the information required by the Act for the political committee, any
12 report or any records of such committee are considered in compliance with the Act. 2 U.S.C.
13 §432(i) and 11 CFR 104.7(a). The identification of individual contributors required by the Act
14 for individuals whose contribution(s) aggregate in excess of \$200 in a calendar year requires
15 providing the individual's full name, mailing address, occupation and the name of the
16 contributor's employer. 2 U.S.C. §431(13) and 11 CFR 100.12.

17 The treasurer will be deemed to have exercised best efforts to obtain the information for
18 this identification if all written solicitations include a clear request for the contributor's full
19 name, mailing address, occupation and the name of employer. 11 CFR 104.7(b)(1) and (2). The
20 treasurer of a political committee must report all contributor information not provided by the

³ In the most recent report filed with the Commission, for each contributor SPAD indicated that the name of the contributor's employers is "not available."

1 contributor, but in the political committee's possession, regarding contributor identification.

2 This includes information in a committee's contributor records, fundraising records and
3 previously filed reports, in the same two-year election cycle in accordance with 11 CFR 104.3.
4 11 CFR 104.7(b)(3).

5 The Supreme Court has held that the disclosure of each large contributor's name and
6 address as well as the donor's occupation and principal place of business serves informational
7 functions, as well as the prevention of corruption and the enforcement of the contribution
8 limitations. *Buckley v. Valeo*, 424 U.S. 1 (1976). The Commission's "best efforts" regulation,
9 cited above, is designed to "promote the very gathering of information that *Buckley* found to be
10 in the public interest." *Republican National Committee v. Federal Election Commission*, 76 F.3d
11 400, 408 (D.C. Cir. 1996), *petition for rehearing In Banc denied*, No. 94-5248 (D.C. Cir. June
12 11, 1996).⁴

13 The Commission notes that it has concluded that a vacation fund administered by a labor
14 organization is a permissible source of voluntary contributions to a separate segregated fund
15 using a deduction authorization plan. See Advisory Opinions 1980-74, 1980-69 and 1979-60.
16 However, your proposal to provide no information regarding your contributors' employers would
17 not meet the disclosure needs of the Act. Therefore, the Commission concludes that not
18 disclosing any employer name for contributors whose contributions exceed \$200 in a calendar
19 year would not fulfill SPAD's "best efforts" obligations as set out in 11 CFR 104.7(b)(1) and

⁴ Congress noted the importance of a best efforts test: The 1979 report from the Committee on House Administration that accompanied the 1979 amendments to the Act noted that "[t]he best efforts test is crucial since contribution information is voluntarily supplied by persons who are not under the control of the committee." H.Rep. No. 96-422, 96th Cong., 1st Sess. 14 (1979).

(2).⁵ However, with a modification, your alternative to report that a contributor is employed by "various U.S.-flag vessel operators" would meet the requirements of the regulations. In addition to this description, SPAD should use information available from SIU vacation fund records about contributors (whose annual contribution exceeds \$200) regarding their most recent employment.⁶ SPAD should include this information in its reports.

This information, even if it does not indicate current employment status, would provide some relevant information for disclosure purposes regarding the recent employment situation of SPAD contributors. Furthermore, the SPAD contributions (that cause the SIU member to exceed the \$200 threshold) are derived from compensation in the form of vacation pay distributed by the member's most recent employer. It is the employment relationship with that employer which directly enables the SIU member to make a contribution to SPAD. Therefore, the entry for a contributor's employer should read: "various U.S.-flag vessel operators: most recently xx company."

The Commission also concludes that the "safe harbor" provisions provided by 11 CFR 104.7 are not applicable to certain separate segregated funds, such as those established by a labor organization or a corporation with capital stock. Separate segregated funds enjoy a special relationship with their connected organizations. A connected organization--whether a

⁵ You state in your request that, technically, members of SIU are unemployed at the time they make their contributions. However, because of the industry's employment practices that you have explained, to disclose their employment status as "unemployed" would be somewhat inaccurate.

⁶ Commission regulations assume that a labor organization has control of its separate segregated fund. 11 CFR 114.5(d) and Advisory Opinion 1996-1. See *Pipefitters Local Union No. 562 v. United States*, 407 U.S. 385, 426 (1972). (The Court concluded "it is difficult to conceive how a valid political fund can be meaningfully 'separate' from the sponsoring union in any way other than 'segregated.' ") The Commission notes your statement that the vacation plan already has the name and address of the union member. You imply in your request that such information could be made available from the plan for reporting purposes if an SIU member fails to provide it.

1 corporation; membership organization, trade association, labor organization, or cooperative—
2 establishes, administers or financially supports its separate segregated fund. See 2 U.S.C.
3 §§431(7), 441b(b)(2)(C) and 11 CFR 100.6. It is presumed that, as a result of this relationship,
4 certain types of separate segregated funds (such as SPAD) will have access to information about
5 contributors (for example, union members) who stand in a special relationship to the connected
6 organization. The Explanation and Justification for the regulations supports this conclusion.
7 The E&J exclusively discusses the “best efforts” obligation as it applies to party committees,
8 authorized committees and nonconnected committees.⁷ See Explanation and Justification,
9 Commission Regulations on “Best Efforts,” 58 *Fed. Reg.* 57725 (October 27, 1993). Separate
10 segregated funds were specifically excluded from the survey project which formed the basis for
11 the regulation since “most SSF’s contributors have an employment or other close relationship
12 with the SSF sponsoring organization.” *Id.* at 57726.⁸

⁷ The Commission acknowledges, however, that other types of separate segregated funds such as membership organizations, trade associations and cooperatives will not have the same access to contributor information as labor organizations and corporations with capital stock. Instead, their situation will be similar to party committees, authorized committees and nonconnected committees with regard to the contributor information they have available.

⁸ The Commission notes that the regulation itself places some importance upon a committee’s obligation to provide information on contributors from its own internal sources when information from the contributor is not forthcoming. See 11 CFR 104.7(b)(3).

Enclosure (AO 1996-1, 1980-74, 1980-69, 1979-60)